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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM
For Meeting of: 1-24-02

January 17, 2002

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 2001-20

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 24, 2002.

Attachment

1 ADVISORY OPINION 2001-20

2
3 Richard F. Carrott, President
4 Careau & Co.
5 PO Box 94073
6 Simi Valley, CA 93094-0733

DRAFT

7
8 Dear Mr. Carrott:

9
10 This refers to your letters dated November 26, November 17, and October 17,
11 2001, on behalf of Careau & Co. ("Careau") and Mohre Communications ("Mohre"), an
12 affiliate of Careau, concerning the application of the Federal Election Campaign Act of
13 1971, as amended ("the Act"), and Commission regulations to what you describe as a
14 "business program for the solicitation, distribution, and accounting of Federal account
15 contributions by credit card over the Internet."

16 You state that Careau, a California corporation, is a marketing company that
17 develops programs for the Internet. It has two pending patent applications that it has
18 licensed to Mohre, a Nevada corporation, to facilitate their joint proposed program for the
19 making of Federal election contributions. As part of this program, Mohre will provide
20 services as an Internet Service Provider and Portal ("ISP"). The various political
21 committees participating in the program will direct their supporters to Mohre's ISP
22 signup site in the hope that the supporter will make two choices: subscribe to the ISP and
23 make contributions to Federal committees. You state that "individuals who choose to
24 subscribe to this full service ISP may do so over the Internet by credit card and may
25 earmark a small portion of the monthly service fees as contributions to specific Federal
26 election committees."¹ You explain that, at the individual's discretion, up to five

¹ You explain that your use of the term "credit card" is meant to encompass credit cards, debit cards, and any other commonly accepted form of electronic transfer of funds in commerce over the Internet.

1 contributions may be made from each month's payment of ISP service fees.² The
2 request's description of the proposed web page states that customers of Mohre will be
3 told "Whether you choose to donate to one committee, some of the committees, all of the
4 committees, or none of the committees, your monthly ISP fee will remain \$17.76. Your
5 choices will not affect your service." The committees that would receive the
6 contributions will be determined by where the subscriber lives. You state that the
7 committees receiving each contribution would pay all the applicable processing fees and
8 any associated merchant account charges. Careau has been in discussions with several
9 Federal committees that have expressed an interest in participating. These include the
10 campaign committees for members of Congress of both the Democratic and Republican
11 Parties, as well as the Democratic National Committee and Republican National
12 Committee. You state that Congressman Buck McKeon has authorized you to publicly
13 indicate the interest of his committee in the proposal.

14 Your request includes further information regarding how the funds would be
15 accounted for and transferred to various candidate committees, as well as the various
16 security procedures Careau and Mohre would take to prevent the making of prohibited
17 contributions. You assert that these procedures are in accord with the relevant past
18 advisory opinions dealing with contributions made through the Internet.

19 You ask whether the above proposal is permissible under the Act and
20 Commission regulations.

21

² According to the request, the price of the ISP services which Mohre offers will be \$17.76 per month. Of this amount, subscribers may contribute \$2.00 per month, in specific amounts, to as many as five "election committees" from the contributor's political party. The request indicates that there is a range of possible amounts that can be given, with amounts starting as low as 30 cents per month.

1 **ACT AND COMMISSION REGULATIONS**

2 Under U.S.C. §441b(a), it is unlawful for “any corporation whatever” to make a
3 contribution or expenditure in connection with any election at which presidential and vice
4 presidential electors or a Senator or Representative in, or a Delegate or Resident
5 Commissioner to, Congress are to be voted for, or in connection with any primary
6 election, or political convention or caucus, held to select candidates for any of these
7 Federal offices. It is likewise unlawful for any candidate, political committee, or other
8 person knowingly to accept or receive any contribution prohibited by this section, or any
9 officer or any director of any corporation or any national bank or any officer of any labor
10 organization to consent to any contribution or expenditure by the corporation, national
11 bank, or labor organization, as the case may be, prohibited by this section. *Id.*

12 For purposes of section 441b(a), the term “contribution or expenditure” is
13 defined to include:

14 any direct or indirect payment, distribution, loan, advance, deposit,
15 or gift of money or any services, or anything of value to any
16 candidate, campaign committee, or political party or organization
17 in connection with any election to any of the offices referred to in
18 [section 441b(a)].

19 2 U.S.C. §441b(b)(2). See also 11 CFR 114.1(a)(1).
20

21 ***APPLICATION TO PROPOSAL***

22 The Commission has considered a number of business arrangements between
23 political committees and corporations to assist a political committee in raising funds. In
24 several past opinions the Commission has reviewed fundraising efforts by committees
25 using certain “affinity marketing arrangements.” See Advisory Opinions 1992-40, 1988-

1 12 and 1979-17. Though the opinions addressed different types of services, the proposals
2 examined were very similar to this one in their basic approach. A corporation (sometimes
3 a bank) would offer to market its services to potential customers who were also identified
4 as supporters of a particular political party or candidate. The party or other political
5 committee would endorse the product or service offered by the corporation. In some of
6 these proposals, the corporation would pay a fee to the political party in return for the
7 endorsements. *See* advisory opinions cited above.³ Rather than viewing these as
8 commercial transactions, the Commission regarded them as fundraising efforts by political
9 committees. The Commission specifically concluded that the fact a business entity
10 contributor received something of value (an endorsement) in exchange for payments that
11 purported to be the proceeds of a commercial sale/purchase transaction did not change the
12 contribution nature of the transaction. The fees/payments received by the political
13 committees were regarded as contributions subject to the prohibitions of section 441b.⁴

³ In Advisory Opinion 1979-17 a national bank proposed to market its credit card services to members of the Republican National Committee. In return, among several options, it offered to pay either a one-time fee to the RNC or a portion of the membership fee paid by each subscriber to the credit card service. Similarly, in Advisory Opinion 1988-12, a county Democratic Party committee proposed to give access to its list of supporters so that a bank could market its credit card services. A portion of each membership fee would be remitted to the local party committee. In Advisory Opinion 1992-40, a company selling long distance telephone services proposed marketing, with the support of political party committees, its services to party members or donors. Again a percentage of the sales generated would be paid to a political party committee as a commission.

⁴ This is in contrast to those situations where a political committee pays a telemarketing firm a commercially reasonable fee in exchange for the firm's efforts to market services which offer an opportunity for a purchaser to contribute to the committee. For example, in Advisory Opinion 1994-33 a telecommunications company proposed to market prepaid phone cards using the endorsements of various authorized candidate committees, as well as political party entities. The cards were produced by the telecommunications company to be distributed by the client political committees. For each instance when time was purchased on the phone card, through use of the purchaser's credit card, a portion of the dollar value of the card so purchased could be designated as a contribution to the client political committee. The committee, however, paid the telemarketing firm a fee which included all processing costs and a commercially reasonable profit. The Commission found this proposal was permissible under the Act and Commission regulations.

1 Although you have described your proposal as one in which the customers of
2 Mohre would “ earmark” contributions to various political committees, your situation is
3 indistinguishable in all material aspects from the earlier opinions (Advisory Opinions
4 1992-40, 1988-12 and 1979-17).⁵ Careau and Mohre propose to make contributions
5 using funds that represent the purchase price paid for its services by its ISP customers.
6 The fact that the ISP customers are allowed to select the recipient of the contributions
7 does not alter the analysis. The cost of the contributions is borne by the corporations, not
8 by its customers who pay only for the ISP services. These customers do not incur any
9 costs in excess of what they are required to pay for the ISP services. Similarly, they are
10 not offered any reductions in fees for the ISP services if they decline to designate a
11 candidate or committee recipient of the purported
12 “contribution” by them.

13 In light of the above, the Commission concludes that the amounts paid by Careau
14 and Mohre to any entity that is a political committee under the Act would be considered
15 contributions to that political committee by Careau and Mohre, and thus subject to the
16 corporate prohibitions of section 441b.

17 The Commission notes that while this conclusion does not prohibit the proposal
18 entirely, it does significantly restrict its scope and the type of committees that may
19 participate. The Act and regulations would not prohibit State or local committees with
20 only non-Federal accounts from participation in the described activity, but such
21 participation would be subject to State or local law. State or local committees with both

⁵ The Commission notes that, as a side issue, no corporation or other entity prohibited from making contributions in connection with Federal elections may act as a conduit for an earmarked contribution to a Federal candidate that is made by a lawful donor. See 11 CFR 110.6(b)(2)(ii).

1 Federal and non-Federal accounts may participate only if the proceeds or payments they
2 receive from Careau and Mohre are placed in their non-Federal accounts, if permitted
3 under State or local law, and used for purposes other than influencing any Federal
4 election, including the payment of the allocable Federal share of voter outreach,
5 administrative and fundraising costs.⁶ See 11 CFR 102.5(a) and 106.5; also see Advisory
6 Opinion 1992-40. The authorized committees of Federal candidates, such as those
7 identified in your request, could not participate in your proposal, while candidates for
8 non-Federal offices and their committees could participate, subject to State or local law.

9 This response constitutes an advisory opinion concerning the application of the
10 Act, or regulations prescribed by the Commission, to the specific transaction or activity
11 set forth in your request. See 2 U.S.C. §437f.

12 Sincerely,

13
14 David M. Mason
15 Chairman
16

17 Enclosures: (AOs 2001-12, 1994-33, 1992-40, 1988-12, and 1979-17)
18
19

⁶ In particular, the Act does provide that certain receipts which otherwise would be contributions are not prohibited by section 441b(a) if they are separately segregated and used only for specifically exempt purposes. For example, donations to a national or State committee of a political party that are specifically designated to defray the costs of the construction or purchase of an office facility are not considered to be contributions or expenditures, provided that the facility is not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office. 2 U.S.C. §431(8)(B)(viii); 11 CFR 100.7(b)(12), 100.8(b)(13), and 114.1(a)(2)(ix). See also Advisory Opinion 2001-12.